No. 8797

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, A CORPORATION, ALICE CLAIRMONT, HENRY CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, ADMINISTRATOR OF THE ESTATE OF R. W. JAMISON, DECEASED, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. B. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY, AND W. A. DUPUIS, APPELLANTS

v.

AGNES MCINTIRE, ALEX PABLO, AND A. M. STERLING, APPELLEES

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8797

United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Lou Goodale Bigelow Krout, Alphonse Clairmont, Flathead Irrigation District, a Corporation, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Remiers, Administrator of the Estate of R. W. Jamison, Deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. B. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Gertrude E. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley, and W. A. Dupuis, appellants

v.

Agnes McIntire, Alex Pablo, and A. M. Sterling, appellees

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION

This action is akin to *Moody* v. *Johnston*, 66 F. (2d) 999, 70 F. (2d) 835, which was recently dismissed by this Court for want of necessary parties. It was brought by the appellee, Agnes McIntire, a white owner of a former Indian allotment on the Flathead Indian Reservation in Montana, to establish a right to the use of certain quantities of the waters of Mud Creek, a stream on the reservation, for the irrigation of her lands, and to enjoin interference with that right. The parties defendant are the United States, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Alex Pablo and A. M. Sterling (who are appellees in this Court), the Flathead Irrigation District, a corporation, and various individuals who are described as members of the Flathead Tribe of Indians.

The second amended complaint, filed May 16, 1936, on which the action was tried, alleges: The Flathead Indian Reservation was set aside for the Flathead Nation by a treaty ratified in 1859 (12 Stat. 975) (R. 74). The Flathead Indians were encouraged to become a self-supporting agricultural people with permanent homes on lands thereafter to be allotted to them in severalty (R. 74–75). The

lands of the reservation can be cultivated only by irrigation, for which one inch of water per acre is necessary (R. 75). Following the treaty, the Indians settled upon the reservation and began to farm by means of irrigation with the waters flowing upon the reservation (R. 75). Michel Pablo and Lizette Barnaby, Flathead Indians, each "made allotment for" described lands (R. 75). In April 1900, Michel Pablo, who was then in possession of both tracts, constructed an irrigation ditch carrying 160 inches of water per second from Mud Creek, of which the allottees thus became the appropriators (R. 75–76). That appropriation has become appurtenant to the described lands and has not been abandoned (R. 76). In 1918 fee patents were issued to Agatha Pablo, wife of Michel Pablo, for the lands allotted to him and to Lizette Barnaby, and thereafter those lands were sold to the plaintiff who now owns them together with 160 inches per second of water appurtenant thereto (R. 76). The Act of April 23, 1904, providing for the allotment of the lands on the Flathead Reservation and the opening of the lands for sale and disposal, as amended by the Act of June 21, 1906 (34 Stat. 355), provides (Section 19):

> That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water. (R. 77.)

From April 1900, continuously up to the present time the ditch has been used in conveying the waters from Mud Creek to the described lands, and the plaintiff claims the benefit of the Act of June 21, 1906, in the use of 160 inches per second of waters carried in the ditch (R. 77). The United States "claims an interest in the waters" of Mud Creek, and has dammed up the Creek and has deprived plaintiff of waters to which she is entitled (R. 78). The plaintiff's right to the use of the waters became fixed prior to the claim of the United States, and the United States, under the Act of June 21, 1906, has no right to deprive plaintiff of them (R. 78). No other parties use the waters of Mud Creek except the plaintiff and the United States acting through the Flathead Irrigation Project, and "this plaintiff and the United States are tenants in common or joint tenants in the use of said water" (R. 78). The waters of Mud Creek "can be divided, partitioned and separated" so that the amount of water to which the plaintiff is entitled can be determined, and the United States is made a party under Title 28, U. S. Code, § 41 (25) "for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant" (R. 78).[1] Harold L.

[1] Title 28, U. S. Code, § 41 (25) (Judicial Code, Section 24, paragraph 25, 30 Stat. 416, 36 Stat. 1094) confers upon the federal district courts jurisdiction of "suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants n common or joint tenants * * *."

Ickes, Secretary of the Interior, is claiming to be in charge, under acts of Congress, of the Flathead Irrigation Project, and Henry Gerharz is claiming to be the Project Engineer in direct charge of the project (R. 78–79). These defendants are claiming that the plaintiff has no water rights on Mud Creek independant of the Flathead Irrigation Project, and are claiming the right to deprive plaintiff of the use of the water except upon the payment to the project of fees and charges (R. 79). The value of the water in controversy exceeds $3,000; this action is necessary to prevent a multiplicity of suits; and the plaintiff has no adequate remedy at law (R. 79). Alex Pablo and A. M. Sterling each claim that the appropriation of Michel Pablo was also made for lands now owned by them (R. 79–80). The Flathead Irrigation District and the individual defendants at one time claimed some rights in the waters of Mud Creek (R. 80).

The plaintiff prayed that the waters of Mud Creek be adjudicated between the United States and the plaintiff; that plaintiff's rights be "partitioned, separated, fixed, and established"; that plaintiff be given a right to the use of 160 inches of water with a priority of April, 1900; and that the defendants be restrained from interfering with the rights of plaintiff as found (R. 81).

After the filing of the original complaint (which was substantially like the amended complaint above summarized), the District Judge ordered the Secretary of the Interior "to appear, plead, answer or

demur" under Judicial Code, Section 57. That Section (36 Stat. 1102, 28 U. S. C., § 118) authorizes a district court to direct a non-resident defendant to "appear, plead, answer, or demur" in a suit to enforce any claim to real or personal property in the district where the suit is brought. The Secretary of the Interior appeared specially and moved that the complaint be dismissed as against him, on the grounds that the court had no jurisdiction over him because the suit was brought in a district other than that of his residence, and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 20–21). The motion was denied (R. 23), and the Secretary did not appear further in the case (R. 166).

The United States and Henry Gerharz, the Project Engineer of the Flathead Irrigation Project, also appeared specially and moved that the complaint be dismissed as against them, the United States on the ground that it could not be sued without its consent and it had not consented to be sued (R. 19–20), and Gerharz on the grounds that the complaint did not state a cause of action against him and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 21–22). These motions were denied (R. 23). Motions by the United States and by Gerharz to dismiss the second amended complaint (above summarized) were also denied (R. 82–85).

The answer of the United States to the second amended complaint sets up four affirmative defenses: 1. The United States has not consented to be sued. 2. The action was not brought for the partition of lands. 3. This action was brought to settle the relative priorities and rights of the parties to the use of the waters of Mud Creek. 4. The facts alleged do not state a cause of action against the United States (R 87–88).

The answer of Henry Gerharz, the Project Engineer, alleges that by the establishment of the Flathead Reservation the United States reserved all the waters of streams of the reservation, including Mud Creek, for irrigation and other uses upon the reservation, and exempted those waters from appropriation (R. 90); denies any knowledge of the alleged appropriation of waters of Mud Creek by Michel Pablo (R. 91); admits that the United States claims an interest in the waters of Mud Creek and has dammed up the creek (R. 91); alleges that all acts done by him relevant to this suit were done in pursuance of the orders, rules and regulations of the Secretary of the Interior (R. 92); alleges that the west eighty acres of the plaintiff's lands were by court order included in the Flathead Irrigation District, that thereafter the district entered into repayment contracts with the United States and those lands of the plaintiff became subject to those contracts, and that he, as Project Engineer, assessed against the lands of the plaintiff certain charges in

connection with the project (R. 93); and alleges that whatever rights the individual defendants have in the waters of Mud Creek are subservient to the rights of and were granted by the United States (R. 95).

In addition, the answer of Gerharz sets forth six affirmative defenses: 1. This action is not for the partition of lands, but to quiet title to the use of waters (R. 95). 2. The facts alleged do not state a cause of action (R. 95). 3. The Court has no jurisdiction of the subject of the action (R. 96). 4. The United States has constructed the Flathead Irrigation Project to irrigate the irrigable lands on the Flathead Reservation and now owns and operates that project (R. 97–98). All the waters of the streams of the reservation, including Mud Creek, are used by the project and are necessary for the irrigation of lands under it (R. 99). Part of the plaintiff's lands are entitled to water from the project upon payment of lawful charges (R. 99), and that is the only water right the plaintiff has (R. 98–99). No waters of the reservation were or could be appropriated by plaintiff's predecessors or any other person (R. 99). When the irrigation project was undertaken the United States recognized water right developments on the reservation antedating 1909, and the Secretary of the Interior appointed a committee which investigated such rights and made a report thereon (R. 99–100). The Secretary approved the report, granted to the west eighty of the plaintiff's lands a right to 1,000 gallons per day of the waters of Mud Creek for

domestic and stock use, and declared that no other water right was appurtenant to those lands (R. 100–101). 5. Pursuant to federal and Montana law, the United States appropriated the waters of Mud Creek in the years 1909 and 1912. Before that, and since, the United States, through the Flathead Irrigation Project, has continuously used all the waters of Mud Creek (R. 101–102). 6. For more than ten years prior to the filing of this action the United States had exercised open and notorious ownership and control of all of the waters of Mud Creek under claim of title. Accordingly the United States has title to those waters by adverse possession, the plaintiff is barred by the Montana statutes from asserting any right in them, and has been guilty of laches (R. 103–104).

The answer of the individual Indian defendants sets forth substantially the same defenses as that of Gerharz (R. 106–107).

The answer of the Flathead Irrigation District follows the same general theory as does that of Gerharz. It alleges that no rights in the waters of Mud Creek could be acquired by appropriation (R. 126), avers that the Flathead Irrigation Project was initiated before the allotment of reservation lands (R. 125), and that by the initiation of the project all the waters of the reservation were segregated and appropriated for the project (R. 125).

The answer of the defendants A. M. Sterling and Alex Pablo admits that Michel Pablo appropriated 80 inches per second of the waters of Mud Creek for the irrigation of his allotment (now the west eighty

of the plaintiff's lands), and that that appropriation has not been abandoned, but denies that any water was appropriated for or used upon the Lizette Barnaby allotment (plaintiff's east eighty) (R. 139–140). By way of cross complaint it alleges that Alex Pablo is the son of Michel Pablo and the owner by allotment of certain described lands (R. 143–144); that A. M. Sterling is the owner of certain other described lands which were formerly the allotment of Agatha Pablo, the wife of Michel Pablo (R. 144); that in April, 1900, Michel Pablo appropriated 560 inches of the waters of Mud Creek for the irrigation of his allotment and those of his wife and children (R. 143), including 80 inches of water for the lands of Alex Pablo and 80 inches for the lands now owned by Sterling (R. 145); that this appropriation has not been abandoned (R. 143); and that the defendants Alex Pablo and Sterling and the plaintiff are each entitled to 80 inches of the waters of Mud Creek, with priority over the rights of any other person but without priority among themselves (R. 146–147).

By agreement of counsel all new matters in the answers were deemed denied without need of a reply (R. 335).

The jurisdiction of the District Court in this suit rests upon Judicial Code, Section 24, paragraph 1 (36 Stat. 1091, 28 U. S. C., § 41 (1)) which confers upon the federal district courts jurisdiction of civil suits which arise "under the Constitution or laws of the United States, or treaties made * * * under their authority * * *."

The consent of the United States to be sued in this suit rests upon Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)) which confers upon the federal district courts jurisdiction—

> of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants * * *.

STATEMENT OF THE CASE

Appellees each assert rights to the use of sufficient quantities of the waters of Mud Creek to irrigate in their entirety their respective lands (R. 81, 148–149). The duty of water on these lands is said to be one inch per second per acre (R. 75, 142), and the plaintiff's tract of land contains 160 acres and those of Pablo and Sterling 80 acres each (R. 75–76, 143–144). Appellees' claims are based upon an alleged prior appropriation of waters of Mud Creek by Michel Pablo for the irrigation of the lands now owned by them, upon confirmation and recognition of the right of appropriation so acquired by Section 19 of the Act of April 23, 1904, as amended by the Act of June 21, 1906, and upon nonabandonment of that right (R. 74–81, 138–149).

As to the merits of those claims, these appellants contended (1) that no right in any waters of the Flathead Reservation could be acquired by an individual by appropriation; (2) that if a right in waters of the reservation could be so acquired, no such quantities of water as are claimed by the plaintiff,

Pablo and Sterling were ever appropriated for their lands; (3) that if such quantities of water ever were used on those lands their use was thereafter in whole or in part abandoned, and that for more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed those waters adversely to the plaintiff and to Pablo and Sterling.

These appellants contended, however, that the determination of these questions upon their merits is precluded because the United States, an indispensable party, has not consented to be sued.

As detailed in the statement of pleadings, *supra*, the District Court overruled the contention that the United States had not consented to be sued, and a trial on the merits was had. Evidence was introduced as to the original appropriation of waters by Michel Pablo—its extent and the lands on which the waters were used—and as to the extent and continuity of the irrigation of the lands of the appellees since that time (R. 239–342). At the conclusion of the trial the District Court held for the appellees upon all the issues and gave a decree awarding each of them the quantities of water they claimed (R. 225).

QUESTIONS PRESENTED

1. Whether the United States consented to be sued in this action by Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), which provides for—

> suits in equity brought by any tenant in common or joint tenant for the partition of lands

> in cases where the United States is one of such tenants in common or joint tenants * * *

2. Whether the United States is an indispensable party to this action.

3. Whether a right to the use of waters of a stream on the Flathead Reservation needed for the irrigation of Indian lands could be acquired by appropriation.

4. Whether, if the preceding question be answered in the affirmative, a right to the use of waters of Mud Creek was acquired by appellees' predecessors, to the extent of 320 inches of water, for use on lands now owned by appellees.

5. Whether, if the two preceding questions be answered in the affirmative, the right to the use of those quantities of waters has been abandoned in whole or in part and has been acquired by the United States through adverse possession.

SPECIFICATION OF ERRORS

The assigned errors which are to be relied upon are: Assignment of Errors of the United States, Numbers 1 through 9, inclusive (R. 344–346); Assignment of Errors of the Secretary of the Interior, Numbers 1 and 2 (R. 347); Assignment of Errors of Henry Gerharz, Project Engineer, Numbers 1 through 7, inclusive (R. 348–349), and Assignment of Errors of the individual defendants, members of the Flathead Tribe, Numbers 1 through 5, inclusive (R. 350–351).

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SUMMARY OF ARGUMENT

I. The United States cannot be sued except when Congress has expressly consented. Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), upon which appellees rely, provides that the United States may be sued in suits "for the partition of lands" of which the United States is one of the "tenants in common or joint tenants." This suit is not within that statute for these reasons:

1. The United States and appellees are not tenants in common or joint tenants of any right in the waters of Mud Creek, and this suit is not for the partition of any such right, but simply to adjudicate the extent and validity of the appellees' water rights. In order for persons to be tenants in common or joint tenants of a water right which is appurtenant to certain land they must be tenants in common or joint tenants of the land to which the water right is appurtenant. The appellees and the United States are not cotenants of the lands—the appellees are the sole owners. The relief actually given by the District Court in no particular resembles partition; its decree merely adjudges that the appellees have certain water rights, and enjoins interference with those rights.

2. The statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters. While a water right partakes of the nature of real estate, and may be appurtenant to land, it is in no sense land.

II. The United States is an indispensable party to this suit. While the United States is not an

indispensable party to a suit to enjoin an official from illegally interfering with rights of property, the United States is an indispensable party to a suit to litigate title to property held or claimed by an official for the United States. And this suit is clearly of the latter type.

III. The claims of the appellees to rights to the use of certain quantities of the waters of Mud Creek fail in their entirety, because their claims are based solely upon an alleged appropriation of those quantities of water for their lands by a predecessor in possession, and it has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation. This argument is not developed in this brief; with respect to it these appellants adopt and rely upon the brief which has been filed for the Flathead Irrigation District.

IV. If rights in the waters of streams of the Flathead Reservation could be acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court. No such amount of water was ever appropriated for the lands now owned by the appellees, by their predecessor in possession upon whose appropriation they base their claims. If such an amount of water was so appropriated, its use was thereafter in whole or in part abandoned, and for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it, adversely to the appellees, and has thereby acquired the right to its use.

ARGUMENT

I

The United States has not consented to be sued in this action.

Assignment of Errors No. 1 of the United States:

> The Court erred in overruling the motions of the defendant, the United States of America, to dismiss the original and the amended Bills of Complaint (R. 344).

Assignment of Errors No. 2 of the United States:

> The Court erred in overruling the motion of the defendant, the United States of America, for judgment upon the pleadings (R. 344).

Assignment of Errors No. 3 of the United States:

> The Court erred in holding that the defendant, the United States of America, has consented to be sued in this action (R. 345).

Assignment of Errors No. 4 of the United States:

> The Court erred in entering judgment against the defendant, the United States of America (R. 345).

Assignment of Errors No. 1 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in overruling the motion of the defendant, the Secretary of the Interior, to dismiss the original Bill of Complaint (R. 347).

Assignment of Errors No. 2 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in entering judgment against the defendant, the Secretary of the Interior (R. 347).

Assignment of Errors No. 1 of Henry Gerharz, Project Engineer:

> The Court erred in overruling the motions of the defendant, Henry Gerharz, to dismiss the original and the amended Bills of Complaint (R. 348).

Assignment of Errors No. 2 of Henry Gerharz, Project Engineer:

> The Court erred in entering judgment against the defendant, Henry Gerharz (R. 348).

Assignment of Errors No. 1 of the individual defendants:

> The Court erred in entering judgment against the defendants, members of the Flathead Tribe of Indians (R. 350).

"* * * no rule is better settled than that the United States cannot be sued except when Congress has so provided * * *." *Ickes* v. *Fox*, 300 U. S. 82, 96.

The District Court found that the appellees and the United States "are tenants in common, or joint tenants in the use of" the waters of Mud Creek, and that those waters "can be divided, partitioned, and separated" so that the rights of the appellees can be determined (R. 211–212, 218), and held that Congress had therefore consented to this suit by Judicial Code, Section 24, paragraph 25, *supra* p. 11.

This statute was originally enacted as Section 1 of the Act of May 17, 1898 (30 Stat. 416). Its legislative history shows that its purpose was to provide a

means whereby persons who were co-owners with the United States of real property could receive their respective interests in severalty. (See 31 Cong. Rec. 3864–3865; House Report No. 959, 55th Cong., 2d Sess.) Moreover, Section 2 of the Act (28 U. S. Code, § 766), which provides that "in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons" makes it clear that no extension of common law principles was intended, but that the purpose of the statute was entirely remedial.

It is the contention of the appellants that this suit is not within this statutory consent to sue the United States because the United States and the plaintiff are not tenants in common or joint tenants of any right in the waters of Mud Creek, and that this suit is not for the partition of any such right, but simply to adjudicate the validity, extent and priority of the plaintiff's water rights. As will be fully shown the appellees' contentions of a tenancy in common or joint tenancy and the findings of the Court below to that effect are wholly inconsistent with appellees' contentions of prior rights and with the relief actually given by the Court. The allegations were inserted merely to give color to the claim that the United States has consented to this suit. Appellants further contend that the statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters.

A. Appellants and appellees are not tenants in common or joint tenants and this not a partition suit, but a suit to adjudicate rights in waters.

The characteristics and incidents of tenancies in common and joint tenancies have long been settled. The fundamental and common feature of both, and of all forms of cotenancy, is unity of possession. Each cotenant is entitled, as against his cotenants, to exclusive possession of any part of the property. In *Russell* v. *Beasley*, 72 Ala. 190, dismissing an action for partition, the court said (p. 190):

> It avails nothing to prove title to a *distinct portion* of the land proposed to be partitioned, for the essence of the estate in common, necessary to be here shown, is that the tenants should "own undivided parts, and occupy promiscuously, because neither knows his own severalty."

In *McConnel* v. *Kibbe*, 43 Ill. 12, 18, the parties owned separate parts of a tract of land covered by one building. Dismissing a suit for partition, the court said:

> The idea of the plaintiff in error that he and the defendant in error hold this property jointly, is not supported by the title deeds. They are neither joint-tenants, tenants in common nor coparceners, but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change.

See also *Hopkins* v. *Noyes*, 4 Mont. 550, 560, 2 Pac. 280, 283; 2 Blackstone, *Commentaries*, pp. 191–192; 2 Minor, *Real Property* (2d Ed.), pp. 1081–1082; 2 Thompson, *Real Property* (1924), pp. 963–964.

While the original application of this principle was to interests in land, it has never been questioned that it is equally applicable to rights in water. There must, accordingly, be unity of possession before there can be a tenancy in common or joint tenancy in a right to the use of water.

It is submitted that the Supreme Court of Montana has reached the correct result in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 64 P. (2d) 845, in which it held that, since rights to the use of water for irrigation are appurtenant to the lands irrigated, a tenancy in common of such rights cannot exist unless the lands irrigated are held in common, and that tenancy in common of an irrigation ditch is not sufficient to create tenancy in common of water rights. The complaint in that case alleged that the husband of the plaintiff had constructed an irrigation ditch and appropriated water thereby for the irrigation of certain land; that subsequently he conveyed part of the land to the defendants and part to the plaintiff; that the plaintiff and the defendants were tenants in common of the ditch and of the right to use the waters, and that the defendants had deprived the plaintiff of her rights in the waters. A demurrer to the complaint was overruled and the defendant appealed. The state Supreme Court held that the complaint did not state a cause of action. And it said (pp. 539–540):

> In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants,

> clearly there was not such a unity of possession between the parties as to render the ownership of the right to use the water as that of tenants in common.

Similarly, in *Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059, 1060–1061, the Supreme Court of Montana said:

> To constitute a tenancy in common there must be a right to the unity of possession * * * and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself.

In accord that a tenancy in common of a water right can exist only if the land to which the water right is appurtenant is held in common, see also *Telluride* v. *Davis*, 33 Colo. 355, 357, 358, 80 Pac. 1051; *Snow* v. *Abalos*, 18 N. M. 681, 696, 140 Pac. 1044.[2]

Equally well settled is the nature of a suit for partition. Such a suit is available only between cotenants. *Shepard* v. *Mount Vernon Lumber Co.*, 192 Ala. 322, 325, 68 So. 880; Freeman, *Cotenancy and Partition* (1874), p. 521. Its purpose is to sever and divide the interests of cotenants.

[2] While it is theoretically possible for a joint tenancy to exist in a water right, no case dealing with such a tenancy has been found. This is perhaps attributable to the tendency to construe cotenancies as tenancies in common rather than as joint tenancies.

> The object of partition proceedings is to enable those who own property as joint tenants, or co-parceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. *Brown* v. *Cooper*, 98 Iowa 444, 454.

Partition of a right in waters held in common is effected "either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds." *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 21. See also *Smith* v. *Smith*, 10 Paige Ch. (N. Y. 470, 474 ff.[3]

According to the strict common law, the plaintiff in a suit for partition must have a clear legal title. No question of title can be tried in an action for partition, and if any such question arises the suit must be stayed pending its resolution in an action at law. *Clark* v. *Roller*, 199 U. S. 541, 545; *Rich* v. *Bray*, 37 Fed. 273, 277 (C. C. Mo.). This rule has nearly everywhere been relaxed, and questions of title arising incidentally in a suit for partition are now usually tried in the partition proceeding. But even where this more liberal practice prevails the determination of title is incidental to partition as the main purpose of the suit. *Torrence* v. *Shedd*, 144 U. S. 527, 532; *Middelcoff* v. *Cronise*, 155 Calif. 185, 191, 100 Pac. 232.

[3] Some courts have asserted that, because of the administrative difficulty of apportioning the use of water, a water right can be partitioned only by sale of the right and division of the proceeds. *Brown* v. *Cooper*, 98 Iowa 444, 454–455; *McGillivray* v. *Evans*, 27 Calif. 92, 96–98.

It is apparent from the pleadings and the relief sought that the appellants and the appellees are not tenants in common or joint tenants, and that this is not a partition suit but a suit primarily for the adjudication of water rights. The appellees claimed (R. 75–76, 143–146), and the District Court found (R. 210–211, 216–217) that Michel Pablo appropriated waters of Mud Creek for the irrigation of certain described lands by means of a ditch which he constructed, that the water appropriated by him became appurtenant to the lands, and that appellees now own those lands together with the water rights appurtenant thereto. The conclusions of law of the District Court recite that the ditch built by Michel Pablo became appurtenant to lands now owned by the appellees, and that they now own the ditch (R. 219–220). The appellees claim that they are joint tenants or tenants in common with the United States of the right to use the waters of Mud Creek, and that those waters can be "divided, partitioned, and separated" so that their rights can be determined (R. 78, 148). But they also contend that their "right to the use of said waters became vested long prior to the claim of the United States" (R. 78, 147), a claim wholly inconsistent with the unity of possession essential to a tenancy in common or joint tenancy. Similarly, the relief that they seek is not only that their rights be "partitioned, separated, fixed, and established," but also that they "be given a prior right to the use of said waters" (R. 81, 148). The decree of the District Court adjudges that the appellees are entitled to water sufficient for the irriga-

tion of their lands, without interference on the part of the appellants, and that the use of this water is their private property and appurtenant to their lands (R. 225–226), thus decreeing a prior right inconsistent with tenancy in common of the appellees and the United States of the right to use the waters of Mud Creek. The decree makes no mention of partition, awards no water to the United States, and contains no reference to its rights.

The position taken by the appellees that they and the United States are tenants in common, or joint tenants, in the use of the waters of Mud Creek, and the findings of the District Court to that effect, are thus wholly inconsistent with other allegations in the pleadings and with the findings of fact, conclusions of law and decree of the District Court. The water rights claimed by the appellees are alleged by them and found by the District Court to be appurtenant to lands of which they are the sole owners. The language of the Supreme Court of Montana in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 539–540, 64 P. (2d) 845, discussed *supra* p. 20, with respect to a similar situation is pertinent. It said:

> It is argued that the allegation that the parties owned the water right as tenants in common is a mere conclusion of law and therefore ineffectual. In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants, clearly there was not such a unity of possession between the parties as

> to render the ownership of the right to use the water as that of tenants in common. (*Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059; *Snow* v. *Abalos*, 18 N. M. 681, 140 Pac. 1044; *City of Telluride* v. *Blair*, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101). The conclusion of the pleader was not supported by the facts alleged.
>
> If the parties to this action had owned the land as tenants in common and the water right was appurtenant to the land, then it might be said that they owned the water right in common.

The United States and the appellees are not even cotenants of the Michel Pablo ditch, though that would not make them cotenants of the water rights.

Moreover the relief actually given does not in any particular resemble partition. The appellees are each decreed to be entitled to certain waters (R. 225). No water is allocated to the United States, the alleged cotenant. Instead its Project Engineer is enjoined from interfering with the rights decreed to the appellees (R. 225–226).

It is plain, we submit, that the United States has not consented to be sued in a suit such as this; that this is in no sense a suit for the partition of lands of which the United States is a cotenant; and that the attempt of the plaintiff to label it as such is but a subterfuge to avoid the sovereign immunity of the United States from suit.[4]

[4] Judge Pray, who presided at the trial of the case, stated in his opinion that he considered himself bound by the earlier ruling of Judge Bourquin upon this question, irrespective of his own views (R. 166–167).

B. The statute applies to lands and not to waters.

What has been thus far said has ignored the fact that the statutory consent is only to a suit for the partition of "lands", while this suit, even if it were a suit for partition, deals solely with waters. "A water right—a right to the use of water—while it partakes of the nature of real estate [citation], is not land in any sense, and, when considered alone and for the purpose of taxation is personal property." *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68. And it is well established that a "* * * suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, 282 U. S. 656, 659. In view of that principle it is submitted that the statute under discussion does not consent to a suit against the United States for the partition of a water right separate and distinct from any partition of lands. As an appurtenance to lands held by the United States in cotenancy with others the waters might be partitioned, but that is not this case.

II

The United States is an indispensable party to this suit.

The District Court held that the United States had consented to be sued and hence did not rule upon the proposition whether the United States is an indispensable party to this suit. It is submitted that the United States is an indispensable party to the suit with respect to all of the appellants, and since the United States has not consented to be sued

the Court below erred in denying the motions to dismiss on that ground.

1. The United States is an indispensable party defendant in this suit under the decisions of this Court in *Moody* v. *Johnston*, 66 F. (2d) 999, and 70 F. (2d) 835. Those suits, like the present, were brought by white owners of former Indian allotments in the Flathead Reservation for the adjudication of water rights alleged to be appurtenant to the allotments. The Project Manager of the Flathead Reclamation Project, who alone had been made a defendant, moved to dismiss on the ground that the United States and the Secretary of the Interior were necessary parties. The District Court denied the motion. At the trial the plaintiffs introduced in evidence a report of the committee which the Secretary of the Interior had appointed to investigate water rights on the reservation antedating the Flathead Irrigation Project, which they claimed showed that water rights were appurtenant to their lands prior to the project. The District Court entered a decree which adjudged that "Plaintiffs are entitled * * * to sufficient water to irrigate their lands," not to exceed a certain quantity of water per acre, without interference by the defendant; and that the defendant be enjoined from levying against the plaintiffs any charges in connection with the reclamation project, from denying the water rights of the plaintiffs, and from in any way clouding the title of the plaintiffs to their water rights. This

Court reversed the decree and remanded the case to the District Court with directions to dismiss for want of necessary parties, unless the plaintiffs within a reasonable time amended their complaints to bring in the necessary parties. As to who were the necessary parties, the Court said (66 F. (2d) at 1003):

> If no greater amount of water is claimed for the allotments in question upon this appeal than as stated in the report of the committee made to the Secretary of the Interior respecting diversions and applications of water for irrigation purposes prior to the initiation of the Flathead Reclamation Project, and such amount of water is recognized as properly apportioned to said lands in the administration of said project, then the Secretary of the Interior would be the only additional necessary party to actions for the determination of questions whether such lands were liable to construction, maintenance, and operation charges imposed on account of the project. Where there has been no recognized determination of the amount or duty of water, even though some indefinite amount may have been diverted and applied to certain allotments or tracts of land prior to the construction of the project works, a determination of the amount of water to which the land may be entitled as well as liability for construction, maintenance, and operation charges may not be determined without not only the Secretary of the Interior being made a party defendant, but the United States or others who may be affected by any change in the use of water available for irrigation.

Thereafter the plaintiffs filed amended bills of complaint, and brought in the United States and the Secretary of the Interior as additional parties defendant, but did not bring in all of the individual water users who would be affected by the decree sought. Upon application of the Secretary and of the Project Engineer this Court thereupon granted a writ of mandamus directing the District Court to dismiss the proceeding on the ground that all the necessary parties had not been joined. In its opinion on the application for mandamus (70 F. (2d) 835, at 839), speaking of its former opinion, the Court said:

> With reference to the United States as a party, we held that, if it was sought by the plaintiffs to litigate a private right in and to the waters as distinguished from the rights asserted by the United States in and to the waters diverted by the United States for the reclamation project and delivered to the defendants, the United States was a necessary party and that the Secretary of the Interior was a necessary party, and that others who would be affected by the change in the use of waters available for irrigation would be necessary parties. . . . It will be observed that we thus called attention to two possible methods of amendment—one requiring only the presence of the Secretary of the Interior; the other requiring all others "affected by any change in the use of water available for irrigation" to be brought in, including the Secretary of the Interior and the United States.

The present case is clearly of the class which this Court thus held could be maintained only if not merely the Secretary but the United States and all other parties claiming an interest in the water were joined. The complaint in this case is devoted solely to the assertion of a water right claimed to exist independently of and anterior to the Flathead Irrigation Project. The plaintiff does not seek a water right under that project, or raise any question as to the charges incident to such a right. The complaint in this case thus closely resembles the amended complaint in *Moody* v. *Johnston*, and in fact was unquestionably modeled after it.[5]

2. The decision of this Court in *Moody* v. *Johnston* that the United States is an indispensable party to a suit like the present is in accord with the precedents. In that case, as has just been shown, this Court drew a distinction between a suit which, like the present, is concerned primarily with the adjudication of a right in waters claimed by the United States and a suit to

[5] The original complaint in this case was filed after the first decision in *Moody* v. *Johnston*, but before the decision on mandamus. The Secretary, the Project Engineer, and the United States were made parties defendant. After the opinion on mandamus in *Moody* v. *Johnston* the complaint in the present case was amended to bring in as additional defendants individuals claiming an interest in the waters. Like the amended complaint in *Moody* v. *Johnston*, the complaint in this case seeks to state a cause of action for partition, and so to bring the suit within Judicial Code, section 24, paragraph 25.

determine the legality of charges assessed by officials of the United States for furnishing to an individual water to which he has a vested right or his right to which is at least not the basic concern of the suit. The Court distinguished, in other words, between a suit to litigate title to property claimed by the United States and a suit to protect property from official action alleged to be illegal. And it held that a suit of the latter type was not a suit to which the United States was an indispensable party, but on the other hand, that a suit of the former type was a suit to which the United States was an indispensable party.

This distinction is precisely that which had been drawn by the Supreme Court in a long line of decisions. That Court has consistently held that a suit against an official of the United States to litigate title to property held by the official for the United States is a suit against the United States—or, what is the same thing, a suit to which the United States is an indispensable party—and so cannot be maintained. *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *New Mexico* v. *Lane*, 243 U. S. 52, 58. See *Carr* v. *United States*,

98 U. S. 433, 437-438.[6] It is equally well established that a suit to enjoin illegal interference by officials with rights of property is not a suit against the United States. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S. 82.

While the distinction between a suit against an official to try title to property held by the official for the Government and a suit to enjoin an official from illegal interference with vested rights of property is sometimes shadowy and productive of considerable difficulty, compare *Ickes* v. *Fox*, 300 U. S. 82, with *Morrison* v. *Work*, 266 U. S. 481, it is clear that the present suit is of the former type. The basic purpose of this suit is avowedly to try the water right of the plaintiff against the United States. The appellees have alleged (R. 77–78, 147):

> That the United States of America, defendant herein, claims an interest in the waters flowing

[6] This Court and the Circuit Court of Appeals for the Fourth Circuit have further elaborated the doctrine: The United States would not be bound by any decree rendered against its official with respect to title to property held by him for the United States, and since a decree would thus be a nullity, such a suit will not be entertained. *Electric Steel Foundry* v. *Huntley*, 32 F. (2d) 892, 893 (C. C. A. 9); *Wood* v. *Phillips*, 50 F. (2d) 714, 717–718 (C. C. A. 4); *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, 456–457 (C. C. A. 4). See also *Sanders* v. *Saxton*, 182 N. Y. 477, 75 N. E. 529. An action of ejectment may be brought against officials holding property for the United States, but that is because such a suit does not litigate the title but only the possession of the defendant. See *Carr* v. *United States*, 98 U. S. 433, 437–438; *United States* v. *Lee*, 106 U. S. 196, 216–217; *Wood* v. *Phillips*, 50 F. (2d) 714, 717 (C. C. A. 4).

> in said Mud Creek and has dammed up said creek and carries part of the waters away from plaintiff, and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States * * *.

Again, (R. 78, 148):

> That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416) for the purpose of completing adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

The prayers for relief ask (R. 81, 148):

> * * * that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff * * *.

There is, accordingly, no question but that this is a suit to litigate title to property claimed by the United States, and that the United States is consequently an indispensable party to the suit.

Furthermore, the District Court held that it had jurisdiction over the Secretary of the Interior, a non-resident of the district where this suit was brought, under Judicial Code, Section 57 (36 Stat. 1102, 28 U. S. C., § 118), which provides that in a suit to enforce a claim to property brought in the district where the property is located the court may order a non-resident defendant to appear. This holding shows conclusively that this suit is to litigate title to property, and since that property, as the appellees themselves assert, is claimed by the United States, that the United States is an indispensable party. And in the only decision which has been found dealing with a suit brought under Section 57 against an official acting for the United States, *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, the Circuit Court of Appeals for the Fourth Circuit squarely held that the United States was an indispensable party to the suit, and that the suit could not be maintained against the officials. In that case the Federal Power Commission had ordered the plaintiff not to build a proposed power dam until it accepted a license tendered by the Commission. The plaintiff brought suit, under Judicial Code, Section 57, in the district in which the dam was to be built, against the members of the Commission, non-residents of that district, alleging that certain provisions of the Federal Water Power Act were unconstitutional. The prayer requested that the Commission's orders be declared void and that the defendants be enjoined from enforcing the Act. The District Court dismissed the

bill on the merits. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with directions to dismiss for want of jurisdiction. It said (67 F. (2d) at 456):

> And this brings us to another and conclusive reason why the suit cannot be sustained on any ground as a suit to remove cloud from title, viz., that no one claiming under the alleged cloud has been made a party to the suit and any relief granted would be entirely nugatory. The defendants are asserting no rights under the orders in question and have no personal interest in them. The interest is in the public represented by the government of the United States. The United States has not been made a party and has not consented to be sued in such a case; and yet it is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit. *Wood* v. *Phillips* (C. C. A. 4th) 50 F. (2d) 714, 717; 5 R. C. L. 669, and cases cited. To grant relief against the defendants here would amount to nothing. It would not be binding upon the United States or even upon the Power Commission.

Certiorari was denied, 291 U. S. 674. Compare *Wood* v. *Phillips*, 50 F. (2d) 714 (C. C. A. 4); *Sanders* v. *Saxton*, 182 N. Y. 477, 75 N. E. 529.

III

It has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation.

With reference to the errors assigned upon the holding of the Court below that the appellees are entitled to the usufruct of certain quantities of the waters of Mud Creek solely upon an alleged appropriation of those quantities of waters by Michel Pablo, and upon their succession to the rights to be acquired,[7] it is appellants' contention that it has never been possible to acquire rights in the waters of the streams of the Flathead Reservation under the doctrine of prior appropriation, and that the claims of appellees must therefore fail in their entirety. This contention is also advanced by the other appellant, the Flathead Irrigation District and is fully presented in its brief filed in this Court (pp. 15–34). In order to save the time of this Court, and to avoid needless duplication, these appellants do not reargue that question, but hereby adopt, and rely upon as their own, the argument upon that question in the brief of the Flathead Irrigation District.

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[7] Nos. 2, 4, 6, 7, and 9 of the United States (R. 344–346); No. 2 of the Secretary of the Interior (R. 347); Nos. 1, 2, 3, 4, 6, and 7 of the defendant Gerharz (R. 347–349); and Nos. 1, 2, 3, and 5 of the individual defendants (R. 350–351).

IV

Even if rights in waters of streams of the Flathead Reservation could have been acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court.

The decree of the District Court awards to the appellees waters sufficient to irrigate their respective tracts of land, not to exceed one inch per acre (R. 225). The tract of the plaintiff contains 160 acres and those of Sterling and Pablo contain 80 acres each. Similarly, the conclusions of law of the District Court recite that the plaintiff is entitled to 160 inches of water per second and Pablo and Sterling to 80 inches each (R. 213, 220).

It is the contention of these appellants that, even if this Court holds that rights in streams of the Flathead Reservation, including waters of Mud Creek could be acquired by appropriation, the record does not support the award to the appellees of as much water as was awarded to them by the District Court. No such amount of water was ever appropriated by Michel Pablo for the lands now owned by the appellees and even if such an amount of water had been so appropriated its use was thereafter in whole or in part abandoned. For more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it adversely to the appellees, and the United States has thereby acquired the right to its use.

As shown *infra*, and as brought out in greater detail in the Brief for the Flathead Irrigation District (pp. 39–43), all the waters of the Flathead Reservation were, before the death of Michel Pablo in 1914, reserved for the Flathead Irrigation Project. The appellees, recognizing that any water rights they assert must antedate that reservation, do not claim any greater quantities of water than Michel Pablo appropriated; they allege merely that the water rights which he acquired for the lands they now own have not been abandoned (R. 76, 143).

A. Michel Pablo did not appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court.

Assignment of Errors No. 6 of the United States:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 345).

Assignment of Errors No. 3 of Henry Gerharz, Project Engineer:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 348).

Assignment of Errors No. 2 of the individual defendants:

> The Court erred in holding that the plaintiff, Agnes McIntire and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 351).

Two witnesses testified for the plaintiff as to the amount of water used, that is, the acreage irrigated, by Michel Pablo: John Ashley, a 77-year-old Indian, and Jean McIntire, the plaintiff's son.

Ashley testified that Michel Pablo irrigated "pretty near all" of three 80 acre tracts—the west eighty of the land now owned by the plaintiff and the eighties now owned by Alex Pablo and A. M. Sterling; that Michel Pablo did not irrigate the east eighty of the land now owned by the plaintiff except for a garden (R. 241).

Jean McIntire, the plaintiff's son, testified that he saw the land now owned by plaintiff in 1907 when he was fourteen years of age; that at that time there were good crops on the land; that crops could not be grown on "the majority of" the land without irrigation; that he did not know the number of acres irrigated in 1907 or the amount of water used (R. 243–244).

Two witnesses likewise testified for Pablo and Sterling as to the acreage irrigated by Michel Pablo: Alex Pablo himself, the son of Michel Pablo, and Andrew Stinger, the partner of Michel Pablo in the cattle business from 1907 or 1908 until the latter's death in 1914.

Alex Pablo testified that Michel Pablo, up until his death, irrigated about 20 acres of his (Alex Pablo's) allotment and about 25 acres of the land now owned by Sterling when he raised hay; that when Michel Pablo grew crops other than hay he did not irrigate (R. 316); that the east forty of his (Alex Pablo's) allotment needs water to raise a good crop (R. 317).

Stinger testified that he was thoroughly familiar with the Pablo ditch; that it was used for the watering of Michel Pablo's stock; that he never saw him irrigate out of the ditch (R. 326).

In addition to these two witnesses, Pablo and Sterling introduced in evidence a certified copy of a notice of water right filed in the office of the clerk and recorder of Missoula County, Montana, in November, 1907. This notice, signed by Michel Pablo and his wife and children, asserted that they had a right to the use of 560 inches of water for domestic and irrigating purposes on described lands, which total 560 acres (R. 319-321). All of the lands for which water rights are sought in the present suit are included in the description except the plaintiff's east eighty.

It is plain that this evidence, even if taken at its face value, does not entitle the plaintiff or the defendants Pablo and Sterling to the amounts of water awarded to them by the District Court.

There is no evidence that the plaintiff's east eighty was irrigated at all, aside from Ashley's testimony that a garden plot was irrigated on it. No water

right for that tract was asserted even in the expansive notice of water right. Accepting Ashley's testimony that "pretty near all" of the plaintiff's west eighty was irrigated, the plaintiff is at most entitled to 80 or 90 inches of water—far short of the 160 inches awarded her by the District Court.

Alex Pablo himself claimed only that his father had—when he grew hay—irrigated about 20 acres of his (Alex Pablo's) allotment (R. 316). While his testimony in this respect differs from that of Ashley, it is evident that Alex Pablo was the better informed of the two, and as an interested party certainly he had no reason to understate the extent of his father's irrigation. Alex Pablo should have no more than the 20 inches of water to which his own testimony entitles him, and not the 80 inches awarded to him by the District Court.

Much the same may be said as to the Sterling eighty. Ashley said that "pretty near all" of it was irrigated by Michel Pablo; Alex Pablo said about 25 acres. The District Court awarded water sufficient to irrigate every inch of it.

Thus, even accepting literally the testimony offered by the appellees, it is plain that the water rights awarded to them by the District Court must be radically scaled down. And that is even plainer when the evidence introduced by the appellants is considered.

When the Flathead Irrigation Project was initiated in 1909, and the waters of the reservation were reserved for the project (as shown *infra*), the Secre-

tary of the Interior determined to recognize all existing water right developments on the Flathead Reservation. Accordingly the Secretary designated a committee to report upon the extent of such developments. This committee, composed of the Superintendent of the Flathead Agency, an assistant engineer of the Reclamation Service, and Alphonse Clairmont, a Flathead Indian selected by the tribal council (R. 272), investigated the status of water right developments on all the lands for which water rights are sought in the present case. Both Michel Pablo and his wife, Agatha Pablo, testified before the committee. A certified copy of their testimony was admitted in evidence (R. 306).

Michel Pablo testified that he irrigated "very little" of the land on his allotment (plaintiff's west eighty); that he used his ditch "for my stock to drink out of and used it on some trees and switched into some gravelly places but not much" (R. 308). He further testified that a map which was shown to him fairly represented the location of the ditches and the irrigated area on his allotment, the allotment of Alex Pablo and on that of Agatha Pablo (now owned by Sterling) (R. 308). A copy of this map is before this Court as Defendants' Exhibit No. 5. Michel Pablo estimated the irrigation on the allotments as "4 or 5 acres where it is gravelly" (R. 308). He testified that most of the soil did not require much irrigation (R. 309).

Agatha Pablo, Michel Pablo's wife, testified that no water was used on her land (now owned by

Sterling); that she let the water run for stock and house use (R. 309).

The committee reported that Michel Pablo had constructed a ditch in 1891 for the purpose of conveying water to portions of his allotment (plaintiff's west eighty); that this ditch "has not been used for irrigation for the past ten years but has been used continuously for domestic and stock purposes; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day for domestic and stock use and that no other water right of any kind is appurtenant to this allotment" (R. 277). The committee similarly reported that the Alex Pablo allotment was entitled to 1,000 gallons per day, and that no other water right was appurtenant to it (R. 282). This report was approved by the Department of the Interior (R. 267).

When the Flathead Irrigation Project was undertaken extensive surveys were made of the reservation, including the lands for which water rights are claimed in this case. The map which is Defendants' Exhibit No. 5 was prepared from one of these surveys (R. 259). That is the same map which Michel Pablo said fairly showed the extent and location of his irrigation. This map shows that in 1910, when the survey was made, there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that 18 acres were poorly irrigated on the Michel Pablo eighty (plaintiff's west eighty) (R. 259). Sperry, the engineer who conducted the survey, testified that

"poorly irrigated" meant "partially irrigated" (R. 259); that when he examined the Pablo ditch in 1910 there was a flow of 38 inches; that the ditch had a capacity of 80 inches; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty) (R. 260).

Later the Commissioner of Indian Affairs appointed a board to survey all the lands of the Flathead Irrigation Project to determine which were irrigable (R. 263). The board found that 67.77 acres of the Michel Pablo allotment (plaintiff's west eighty) were irrigable (R. 251, 263). No classification of the Barnaby tract (plaintiff's east eighty) was made because the board considered it too gravelly and sandy to irrigate and because it was not in the irrigation district (R. 263).

Henry Gerharz testified that he had been on the Barnaby tract and had never seen a ditch across the land nor observed that the land had been plowed (R. 252).

Mayer, a watermaster of the Flathead Irrigation Project, testified that he had examined the Pablo ditch in 1922 and frequently since; that in 1922 the ditch had a capacity of 60 inches; that he had never seen any physical evidence that the ditch had at any time a capacity of 160 inches (R. 311).

As has been shown, the evidence introduced on behalf of the appellees, though it be accepted in its entirety, does not at all support the award by the District Court of water for the irrigation of *every single acre* of their lands. But any doubt on that

score is wholly resolved by the evidence just summarized, which is manifestly of a trustworthy character.

That evidence is conclusive that there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty) in 1910, and that there had not been any irrigation on it for many years before that. It is highly doubtful if that tract is even irrigable. As to the Michel Pablo tract (plaintiff's west eighty), and the tracts now owned by Alex Pablo and A. M. Sterling, the testimony of Michel Pablo, of Agatha Pablo, his wife, and of the government surveyors agrees that only a few acres were irrigated, or semi-irrigated, by Michel Pablo. And, it will be recalled, that is about what Alex Pablo testified himself.

B. If Michel Pablo did appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court, the use of that much water upon those lands was thereafter abandoned, and for more than the statutory prescriptive period of ten years the United States has used those waters, or part of them, adversely to the appellees.

Assignment of Errors No. 8 of the United States:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 346).

Assignment of Errors No. 5 of Henry Gerharz, Project Engineer:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 349).

Assignment of Errors No. 4 of the individual defendants:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 351).

We have sought to show that Michel Pablo, through whom the appellees claim, did not use on the lands now owned by them waters even approaching in amount the quantity awarded to the appellees by the District Court. We will now seek to show that even if Michel Pablo did use such quantities of water, that their use on the lands now owned by the appellees was thereafter, in whole or in part, abandoned, and that for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and

claimed those waters, in whole, or in part, adversely to the appellees.[8]

Jean McIntire, the plaintiff's son, testified that Moody, then Project Engineer of the Flathead Irrigation Project, told his father, when the latter first acquired the land in 1924, that the government did not recognize that he had any water right for irrigation, but only for stock and domestic purposes (R. 243–244); that since the McIntires acquired the land they have irrigated, for grazing purposes, "approximately 40 acres" of their east eighty (the Lizette Barnaby allotment), and "possibly 20 acres" of their west eighty (the Michel Pablo allotment) (R. 244–245); that the government, by means of the Pablo Feeder Canal, crossing Mud Creek, had cut off the water of Mud Creek and that the only water in Mud Creek during the irrigation season was water that seeped out of or underneath the Feeder

[8] "There seems to be no question, under the authorities, but that the right to the use of water may be acquired by prescription as against a private person, and that the lapse of time necessary to give such right is the period limited by the statute of limitations for entry upon lands." *State* v. *Quantic*, 37 Mont. 32, 54, 94 Pac. 491. Ten years is the period of limitations for the recovery of lands under the Montana statutes. Revised Codes of Montana (1935), § § 9015–9018.

Revised Codes of Montana (1935), § 7094, provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

Canal and water from springs (R. 336–337); that all the irrigation that had been done on the plaintiff's land was with this seepage and spring water (R. 338); that "There was no water available to irrigate these two eighties from the Pablo Ditch" (R. 338); that "There was no water in the ditch because the Government takes all the water, with the exception of that which comes out of the springs" (R. 341).

Tom Moore, testifying for Alex Pablo and A. M. Sterling, stated that he had farmed all of the tracts for which water rights are sought in this case except the Barnaby tract (plaintiff's east eighty); that he did not irrigate much of the Michel Pablo land (plaintiff's west eighty) when he was farming it; that he irrigated about 10 acres of the Alex Pablo land when he was farming it; that all of that land could be irrigated; that he had farmed the Agatha Pablo (Sterling) land since 1925, and had irrigated approximately twenty to twenty-five acres; that all but three acres of that land could be irrigated (R. 324–325).

Numerous witnesses testified for the appellants that since 1913 all of the waters of Mud Creek have been picked up by the Flathead Irrigation Project by means of the Pablo Feeder Canal and applied to irrigation on the lands of the project, except such quantities of water as were released to satisfy private water rights recognized by the government, such as the 1,000 gallons of water daily which the government concedes to the plaintiff and to Alex Pablo.

Stockton, an engineer, testified that in 1907 he drew up plans for the project for taking up all the

available water in Mud Creek and other streams on the reservation; that in 1908 he was informed that the Pablo Feeder Canal was planned to perform that function (R. 256).

Sperry, also an engineer, testified that in 1910 that part of the Pablo Feeder Canal which picks up the waters of Mud Creek was constructed (R. 258); that since 1913 all of the waters of Mud Creek have been used on land lying under the Flathead Irrigation Project except waters let go by to supply private water rights recognized by the United States (R. 259); that all of the available water is used (R. 259–260); that in 1929 or 1930 he was on these lands classifying the irrigable acreage; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that part of the Michel Pablo allotment was sub-irrigated and would not require any water (R. 260); that irrigation of new lands with the waters of Mud Creek through the Feeder Canal began in 1919 (R. 261).

Henry Gerharz, the Project Engineer, testified that 1,000 gallons of water a day had been delivered to Michel Pablo; that that was all he was recognized as entitled to but that he had seen more water than that on the place many times (R. 295).

Mayer, a watermaster of the Flathead Irrigation District, testified that he has visited the plaintiff's lands many times since 1922; that he has crossed the Pablo ditch several times a week during the irrigation season since 1922; that there has been very little irrigation on the land since 1922; that three years ago

(1933) there were a few little furrows plowed out from the Ditch on the plaintiff's west eighty; that two years ago there was another such ditch; that since 1922 the water in the Pablo Ditch had been used more for stock than anything else; that in 1922 the Ditch had a capacity of about 60 inches; that the Ditch was in worse shape now; that he had never seen any crops irrigated on any of the plaintiff's lands with water from the Ditch (R. 310–312).

Dellevo, one of the Commissioners of the Flathead Irrigation District, testified that the water supply of the district had been insufficient since the early twenties (R. 329); that the waters of Mud Creek have been directed into the government project system ever since the construction of the Pablo Feeder Canal (R. 330); that there is an acute shortage of water in the area in which the waters of Mud Creek are used (R. 332).

The evidence has been stated at this length to show how far short it falls of supporting the Decree of the District Court. If there was ever any substantial amount of irrigation on these lands, in the days of Michel Pablo, which, it is submitted, there was not, it is clear that such irrigation was abandoned almost in toto many years ago. All of the testimony agrees that only slight and spasmodic irrigation has occurred on these lands over the last twenty-five years. Possibly the lands are entitled to some water in excess of the 1,000 gallons daily. But clearly they are not entitled to any such quantities of water as were awarded to them by the District Court.

We wish further to call to the Court's attention the fact that the plaintiff's west eighty (the Michel Pablo tract) was included in the Flathead Irrigation District, upon the creation of the district in 1926, and has been included ever since (R. 270–271; Defendants' Exhibit No. 16, p. 6; R. 338). Although the plaintiff could have objected to the inclusion of her lands on the ground that water rights were already appurtenant thereto (Montana Rev. Code (1935), § 7169), she did not do so, nor has she ever sought by legal proceedings to have her land excluded from the district. The plaintiff has been paying the charges of the irrigation district, and these payments were not paid under protest (R. 339).

The decisions are clear that the plaintiff lost the right to object to the inclusion of her land in the district on the ground that water rights were already appurtenant thereto by her failure to urge that claim in the court proceedings which attended the creation of the district and the inclusion of her land therein. *Tomich* v. *Union Trust Co.*, 31 F. (2d) 515 (C. C. A. 9). See also *Judith Basin Land Co.* v. *Fergus County, Montana*, 50 F. (2d) 792, 793 (C. C. A. 9).

The plaintiff must, therefore, continue to pay all lawful charges assessed by the irrigation district upon her lands which are in the district, and the plaintiff is entitled, as the district has always recognized (R. 263, 339), to be furnished by the district with water for the irrigation of those lands whenever she so requests. The plaintiff thus has a water right, under

the irrigation district, for the irrigable acreage of her west eighty acres. And the decree of the District Court awards to her another and an independent right to water sufficient for the irrigation of her entire tract. In this respect, it is submitted, the decree of the District Court plainly violates the cardinal principle of water law that beneficial use limits the extent of a water right. For obviously the plaintiff cannot put to beneficial use on her west eighty double the quantity of water necessary for its irrigation.

CONCLUSION

The decree below departs from the well settled and applicable rule that the United States may not be sued without its consent. For that and the other foregoing reasons it is submitted that the decree of the trial court should be reversed with directions to dismiss the bill of complaint.

Respectfully submitted.

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